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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 497.

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

v.

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

BRIEF FOR RESPONDENTS.

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

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BRIEF FOR RESPONDENTS.

Statement.

This cause comes before this Court on writ of certiorari granted on December 9, 1946. The judgment of the Circuit Court of Appeals, Second Circuit, was entered upon a decision which unanimously affirmed a judgment entered in the District Court, Southern District of New York, after trial before the Honorable William Bondy, *J.*, without a jury.

The Question Presented.

This is an action to recover additional compensation, liquidated damages and attorneys' fees due under 29 U. S. C. A., Sections 207, 216(b) also known as the Fair

Labor Standards Act of 1938.* The plaintiffs-respondents were employed by the defendants-petitioners as maintenance employees of a loft building in New York City. Coverage under the Act has been expressly conceded (R. 74).

The sole question in this Court is whether the compensation paid to these plaintiffs for such hours as they worked beyond 40 of each week constituted compliance with the defendants' obligation to pay the plaintiffs therefor "at a rate not less than one and one-half times the regular rate" of employment: 29 U. S. C. A., Section 207(a).**

The Facts.

A. The Events Which Led Up to the New Employment Agreement.

The employment period with which we are here concerned began on April 20, 1942 (R. 54-61). For a proper understanding of the method of compensation which then prevailed, however, it will be necessary to briefly consider the method of compensation which had preceded it.

Throughout the period between April 24, 1939 and April 20, 1942 the plaintiffs had been employed under the terms of a collective bargaining agreement known as the Sloan Agreement (Ex. 3). The parties to that agreement had been the Realty Advisory Board on Labor Relations, Inc. of which the defendants were members and

* The relevant sections of the Act are set forth at length in the Appendix on pp. 29-30.

** This action, now continued as to only 7 plaintiffs, originally included claims for liquidated damages arising out of a prior employment period. The answer of the defendants had questioned coverage and interposed alleged general releases. After the decision in the plaintiffs' favor in the District Court these amounts were finally paid under a stipulation pursuant to which the claims with which we are now concerned were severed (R. 72-5).

Local 32-B of the Building Service Employees International Union of which the plaintiffs were members (id.). The outstanding characteristic of that agreement was that each plaintiff had been employed upon a fixed work-week of either 48 or 47 hours (in the case of the night watchmen of 60 hours) and had received his compensation in the form of a fixed weekly wage (Ex. 3; R. 42, 44).

The Sloan Agreement was to expire by its terms on April 20, 1942 (Ex. 3). During the months of December of 1941 and January of 1942, however, the Circuit Courts of Appeals in the Third and Fourth Circuits handed down two decisions in favor of employees the effect of which would be to render the payment practices under the Sloan Agreement illegal. The decision which was subsequently to be affirmed by this Court under the title of *Kirschbaum* v. *Walling*, 316 U. S. 517, held that the employment of maintenance employees in buildings of which substantial portions were occupied by tenants in the production of goods for interstate commerce fell within the purview of the Fair Labor Standards Act. And the decision which was subsequently to be affirmed by this Court under the title of *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, held that, where the compensation in an affected employment is upon a weekly basis, the regular hourly rate for the calculation of the additional compensation for overtime is the quotient of the weekly wage divided by the number of hours worked during the week.

Accordingly, with the decisions in the *Kirschbaum* and *Missel* cases in the Circuit Courts in front of them, and anticipating their affirmance by this Court, the employers set about to devise a plan through which the payment practices under the old Sloan Agreement might be continued. The expressed purpose of that plan was to standardize a 54 hour week for watchmen and a 46 hour

week for the other employees through the incorporation into the new collective bargaining agreements of "special formulae for computing hourly rates and overtime" required by the "prospective application to loft buildings of the Fair Labor Standards Act" (Ex. 4, p. 70, first paragraph).

The plan devised involved the use of a special formula calculated to cause a fixed weekly wage for an extra-statutory workweek to simulate compensation based upon an hourly rate. The formula was first inserted in the new closed shop agreement (Meyer Agreement). After this Court's affirmance of the *Kirschbaum* and *Missel* decisions, the same formula was inserted in the new open shop agreement with which we are directly concerned in this litigation (Ex. 4, p. 70).

Before examining the new contract formula, a few words may be said about the position of the National War Labor Board. That position is set forth quite clearly in the NWLB Directive Order (Ex. 4, p. 70). As there stated, the new formula had already been inserted in the new closed shop agreement (Meyer Agreement). By reason of that prior adoption before the NWLB had even come upon the scene, the Board's principal aim was to cause the formula to be inserted in the new open shop agreement upon the ground that it had "already been accepted in principle by the parties" (Ex. 4, p. 34, ll. 6-8).*

B. The Employment Period after April 20, 1942 (the Period Covered by This Suit).

The Sloan Agreement expired April 20, 1942 (Ex. 3). The new collective bargaining agreement was executed on September 1, 1942, but included a provision under which

* We shall see hereafter that the Board itself misapprehended the effect of the new formula, and believed that it would substantially increase the employees' minimum hourly rates (see pp. 12-13, *infra*).

an attempt was made to render it retroactive to April 21, 1942 (Ex. 1, p. 12). Our statement at this point will be confined to a consideration of the new collective bargaining agreement as such. The attempted retroactive feature will be considered separately hereafter.

The parties to the new agreement were the Realty Advisory Board on Labor Relations, Inc. which represented the employers including these defendants and Local 32-B of the Building Service Employees International Union representing the employees including these plaintiffs (Ex. 1).

The cover of the agreement bore the legend in capital letters "National War Labor Board Agreement" (Ex. 1). As we have seen, however, the National War Labor Board was not a party thereto.

The agreement fixed the workweeks for employees other than watchmen at 46 hours per week and for watchmen at 54 hours per week (Ex. 1, pp. 27, 28). It also fixed minimum weekly wages whose exact amounts were determined by the area of the affected building (id., p. 25).

By stipulation entered into upon the trial (and amended in certain immaterial respects while the appeal was pending in the Circuit Court of Appeals), each of the plaintiffs was employed by the defendants pursuant to the terms of that master agreement. More specifically, each of the plaintiffs received a fixed weekly wage for a workweek whose hours were set at a constant figure which was substantially longer than the statutory maximum workweek (R. 41-3, 49-52).

If this new agreement had contained nothing further with respect to the manner of compensation, its terms would have been indistinguishable from the flat weekly wage for a fixed extra-statutory workweek which had rendered the Sloan Agreement illegal. An attempt was now made, however, to create a basis for differentiation. That method involved a formula which must now be examined.

The formula was as follows (Ex. 1, p. 27):

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The significance of this formula is to be found in an analysis of its effect as a matter of arithmetic. We may illustrate its use by reference to the position of the typical employee whose workweek was fixed at 46 hours. Using the Mis-el formula, the regular hourly rate of his employment would be the quotient of the weekly wage divided by 46. Under this new device, however, the alleged regular hourly rate would be the quotient of the weekly wage divided by 46 plus ½ of 6—that is, the quotient of the weekly wage divided by 49. The selection of 49 as the divisor was in anticipation of the number by which the quotient would subsequently have to be multiplied in order to determine the weekly earnings. For the effect of the Act was that an employee working on a 46 hour week would be entitled to receive 49 times his regular hourly rate (the arithmetical equivalent of 40 times the regular hourly rate plus 6 times the overtime rate of time and one-half).

Thus, the entire process was simply a tautology. By causing the weekly wage to be divided by the very same number by which the resultant quotient was subsequently to be multiplied in order to determine the weekly wage, the calculator was always assured of returning to the same number from which he had started.

In order that the tautological function of the formula may be still clearer, we may work out a complete example of its use. We shall choose for this purpose figures of

macrocosmic proportions so that the calculations may easily be made by mental arithmetic. Suppose an employee to be receiving $110 a week for a 50 hour workweek. Applying the formula, his hourly rate would be $110 divided by 55, or $2. He would then be listed as having received 40 times $2 or $80 for his straight time plus 10 times $3 or $30 for his overtime, making a total of $110.

This formula was the first step in the scheme designed to cause a flat weekly wage for a fixed extra-statutory workweek to simulate a compensation under which straight time and overtime had been the subject of different rates. The purpose of that scheme was to show that the flat weekly wage—any flat weekly wage—might have been built up upon the basis of the differential rates required by the Act and that, since it might have been so derived, it should be treated as though it had been.

Once the formula had been used in order to show that a figure really did exist from which the weekly wage might have been derived, it remained only to invoke proper supporting devices in order to give to the precipitate of the formula a verisimilitude. In other words, the employers now took what they believed to be adequate precautions to cause the result of their mathematical formula to simulate the basis of the weekly compensation. We must now consider what those efforts were.

The principal device utilized by the defendants to cause it to appear that the weekly wages had been compounded of separate straight time and overtime hourly rates rested in the form of their weekly payroll records. A comparison of that form with the one which had been used prior to the date of the signing of the new agreement will show that the old form had been expanded by the addition of certain new columns. These new columns purported to state for each employee: the number of hours which con-

stituted his "regular time", his hourly rate therefor, the number of hours which constituted his "overtime", his hourly rate therefor, and his total weekly pay (Ex. 6). A cursory inspection of these columns would give the impression that the employee's earnings had been based upon an underlying hourly rate, that the compensation for "regular time" was the product of that hourly rate by the number of hours up to 40, that for each additional hour he received an "overtime" hourly rate which was 1½ times the "regular time" hourly rate, that his compensation for such overtime hours was the product of such hours and the overtime rate, and that the "total pay" listed in the right hand column represented the sum of his "regular time" and "overtime" pay respectively (Ex. 6). Each of these weekly payroll records was then signed by the affected employees upon the receipt of their weekly wages (id.).

If we look beneath the columnar headings, we shall find that these payroll records contain an important message. A few illustrations will make that message clear.

Let us start with Exhibit 6, payroll record 100. It there states that the plaintiff Manne received $28.90 as his total wage for the 46 hour week. The regular hourly rate under the contract formula is stated to be .589 and the rate for overtime hours is stated to be .884. If, however, we were to use these figures as the basis for a computation of the amounts payable for straight time and for overtime respectively, the payment for straight time would be $23.56 (40 times .589) and the payment for overtime would be $5.30 (6 times .884). On that basis, Manne's total earnings for that week should have been $28.86, or 4¢ less than he actually did receive. The payroll record avoided that situation by the injection of two arithmetical errors, the combination of which picked up the extra 4¢. It stated the total payable for straight time at $23.59

(which was 3¢ too much) and the total payable for overtime at $5.31 (which was 1¢ too much)..

The situation described in the preceding paragraph was typical. Thus, throughout the entire period between the week ending October 16, 1943 and the week ending December 11, 1943, the formula overtime hourly rate which should have been given to McCole, upon the basis of his formula straight time hourly rate of .48, was .72. Instead, his overtime hourly rate was stated at .69 (Ex. 6, payroll records 94-103). Throughout the same period Torra, with a stated formula hourly rate of .6525, should have had a formula overtime hourly rate of .9787. Instead, his overtime hourly rate was stated at .9650 (id.).

The foregoing are simply a few among the many instances of a general pattern which is exhibited, in one form or another, on every payroll. There is not a single payroll record which is free from some error respecting either the hourly rate as computed with the formula or the derivative overtime hourly rate or the result of the calculation which the proper use of the formula hourly rates would have produced.

The true meaning of formula and payroll records will now be clear. While the discrepancies involved are fractional, we cannot miss the significance of their ubiquity. They are not simply errors of calculation chargeable to the ministerial employees to whom the task of calculation had been entrusted. They point clearly to the fact that the defendants themselves were uniformly cynical with respect to any meaning or value from the use of a formula in a situation in which the weekly wage for the fixed workweek had been independently determined. Atrophy of form flowed inevitably from absence of function.

In view of the importance which the defendants have always attributed to the form of these payroll records, a final word may be said with respect to the only interpretation which their content renders tenable.

The function of the formula to enable the employers to set in motion a chain of arithmetical operations designed to lead the calculator back to the number from which he had started was difficult of attainment in practice. That difficulty was occasioned by the fact that the hourly rate which the formula produced was invariably an infinitely repeating decimal (Ex. 6). Unless, therefore, the defendants were prepared to maintain bookkeepers especially engaged in carrying out all these calculations to a very large number of decimal places, the cycle would never return to the original number to which it was ideally linked. The defendants realized the fundamental sterility of the entire procedure. So, knowing in advance the result which calculations carried out to an infinite number of decimal places would have produced, they forebore to trouble themselves with more than a perfunctory genuflection to the formula in practice. Having first determined the weekly wage which each employee was to receive, they then used the formula to derive a rough quotient. Then, when it became evident that the failure to carry out that rough quotient to a sufficient number of decimal places would precipitate a wrong answer, they simply picked up the slack by injecting the requisite quantum of corrective error either into the calculation of the overtime rate or into the multiplication of rate by hours. The whole process was perfectly analogous to the act of a schoolboy in a class in arithmetic who, having first looked at the answer in the back of the book, proceeds to "solve" the problem by simply writing down a series of numbers which are not too ostensibly irrelevant, and then draws a line and writes in the answer.

The weekly payroll records themselves conclusively negative the possibility that these weekly wages had been compounded from regular and overtime hourly rates applied to bracketed categories of hours.

The payroll records represented defendants' sole attempt to establish that the weekly wages of these plaintiffs had been built up from differential rates applied to regular time and overtime as required by the Act. An additional attempt was made, however, to gain recognition for the quotient of the formula as the true hourly rate. That attempt was predicated upon the fact that, in those instances in which an employee's weekly wage was adjusted by reason of excusable or inexcusable absences, such adjustments were based upon the use of the "hourly rate" derivative from the application of the contract formula to the weekly wage (R. 47-9).

C. The Improbability That Anyone, Save the Payroll Clerks, Ever Knew What the Formula Quotients Actually Were.

During the summer of 1942, the defendants calculated the hourly rates of the plaintiffs under the old Sloan Agreement, using the *Missel* formula (Ex. 5). A tabular comparison of those hourly rates with the quotients derivative from the application of the new formula to the new weekly wages would exhibit the following relations:

Plaintiff's Name	Old Hourly Rate (See Calculations in Ex. 5)	Rate Derivative from the Application of the Formula to the New Weekly Wage (See Appendix A of Petitioners' Brief)	Relation of New Formula Quotient to Old Hourly Rate
Del Rio	.530	.544	+ .014
Manne	.530	.544	+ .014
McCole	.420	.392	— .028
Peterson	.530	.544	+ .014
Torra	.600	.604	+ .004
J. H. Berger	.820	.769	— .051
Rodriguez (also known as Sanchez)	.620	.577	— .043

These figures tell a significant story. For the 7 plaintiffs with whom we are concerned on this appeal, an hourly rate determined by the formula quotient would have had the following results: 3 plaintiffs would have received hourly increases of less than 2%, 1 an hourly increase of less than 1%, and 3 hourly decreases of approximately 7%.*

Accordingly, a comparison of the old hourly rates with the quotients derived from the application of the formula to the new weekly wages establishes the improbability that the formula quotients would ever have been accepted as the bases of the wage bargain. They would have been rejected by the employees not only by reason of their discriminatory character, but for the further reason that they wholly failed to give the kind of "wage increases" which the National War Labor Board itself had recommended (Ex. 4, p. 3). Even the employers would probably have forborne the attempt to fix rates which, as to at least 3 of their employees, would have violated the express contractual provision prohibiting any reduction of an employee's hourly rate (Ex. 1, p. 6). And it is improbable that the National War Labor Board would have countenanced it, had it known: since that Board had recommended uniform wage increases to meet the rise in the cost of living and had declared its belief that the employers' offer of a 10% increase was "totally inadequate" (Ex. 4, pp. 3, 26-7).

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* These relationships were masked by stating the compensation in the form of fixed weekly wages. For the men did not yet know the extent to which their weekly wages under the old Sloan Agreement had been insufficient under the Act. On the date when the new agreement became effective, defendants' attempt to settle their obligations under the old Sloan Agreement had not yet been made (R. 65). Thus, one effect of stating the new wage in the form of a flat weekly amount was to cause each man to compare it, simply, with the old insufficient wage which he had actually been receiving and thus to believe that the new wage represented a substantial increase.

Additional corroboration of the fact that no one—neither employee nor employer nor the National War Labor Board—was thinking in terms of hourly rates as fixed by the formula quotients rests in the manner in which the later wage increases were expressed. In each instance, the increase was calculated and expressed as an increase to the weekly wage. Thus, the September 5, 1942 increase was described as an increase of $2.50 per week and the October 29, 1943 increase was described as an increase of $1.40 per week (Ex. 6, payroll records 35 and 97).

One final aspect of this situation must now be noted, since it represents the clearest indication which we have of the National War Labor Board's real feeling about the formula.

The Board had stated that the new minimum hourly rate which would prevail under this agreement in loft buildings of this class would be "something over 59¢" (Ex. 4, p. 34, the first sentence following the diagram). Now if the hourly rates were to be calculated by the application of the defendants' formula to the weekly wage, that would be untrue (Ex. 6). If, however, we take the new minimum weekly wage of $27.50 and calculate the hourly rate by dividing that wage by the number of hours regularly worked (46), our answer will, in fact, be 59¢.

Thus (and whatever the National War Labor Board may elsewhere have said in lip service to a formula which had been adopted before it had even come upon the scene), it is clear that the Board itself was actually thinking in terms of the only arithmetically sound way of deriving hourly rate from weekly wage—the Missel formula.

D. The Employers' Practical Construction of the Point at Which Overtime Compensation Began.

The agreement provided that, if an employee other than a watchman worked more than 46 hours in any week, the additional hours would be compensated at the rate of time and three-quarters the hourly rate as computed under the contract formula. For watchmen the base was 54 hours and the rate for the additional hours was double time (Ex. 1, p. 29).

In Appendix B of the National War Labor Board Directive Order, the following explanation of this provision is given (Ex. 4, p. 70):

> "Overtime over forty-six (46) hours is paid at a rate of time and three-quarters in an effort approximately to equal the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half after a forty-six (46) hour week."

The employers thus recorded their own belief that the use of the formula quotient as an hourly rate would withhold from the employees the compensation to which they would "ordinarily be entitled" if overtime were to be computed on the basis of time and a half. They took steps to see to it that the employees would receive an approximate equivalent of the overtime compensation of which the inadequacy of the formula quotient had deprived them. But their concern and the steps taken to remedy the condition occasioned by the inadequacy of the formula quotient were confined to the hours above 46. In the exclusiveness of that concern and in their disregard of what must have been recognized as the parallel inadequacy of the formula quotient with respect to the hours between 40 and 46, we have a practical construc-

tion of the point at which ordinary overtime compensation was intended to begin. That point was with the hours above 46, not with the hours above 40.

It might perhaps be suggested that a special premium for hours above 46 is consistent with overtime compensation also for the hours between 40 and 46: that it is possible to construe the special solicitude for the hours above 46 as representing an effort to give a special premium beyond and in addition to the ordinary overtime compensation. But while such a construction might be the proper one with respect to superficially similar provisions in other contracts, it is negatived by the express language of this one. The present provision establishes that the steps taken with respect to hours above 46 were not taken for the purpose of conferring a special premium. They were taken instead for the sole purpose of giving the employees that compensation for overtime to which they would "ordinarily be entitled if it were computed on the basis of time and a half."

Thus, this provision establishes at once both the defendants' recognition of the inadequacy of the formula quotient as the basis for the calculation of ordinary overtime compensation and their own intention that overtime compensation was to begin only with the hours in excess of 46.

E. From April 20, 1942 to September 1, 1942: the Retroactive Period.

From the expiration of the Sloan Agreement on April 20, 1942 until the signing of the new agreement on September 1, 1942 there had intervened a period of about 20 weeks. The payroll records throughout that period lacked even the simulation of a statement of hourly rate. The formula fig leaf was attached later (Ex. 6, payroll records 13-34).

After the signing of the new agreement, however, each plaintiff was given an additional lump sum which purported to be a bonus calculated at the rate of $2.50 per week for each week that he had worked during the period which had succeeded the expiration of the Sloan Agreement (id., payroll record 35).

It is Petitioners' present position that "all work performed from April 21, 1942 to September 5, 1942 was performed in anticipation of and subject to the new wages of which the hourly rates were an integral part", and that, upon the employee's acceptance of that lump sum, he must be deemed to have received proper compensation for such past overtime hours in accordance with the Act (Petitioners' Brief, p. 10, ll. 1-4).

Let us, for the purpose of our present consideration, assume that the compensation plan effectuated by the new agreement had constituted a proper compliance with the purpose of the Act to load the cost of all employment in excess of 40 hours per week. Petitioners have still failed to explain just how a system of lump sum retroactive payments could have operated *nunc pro tunc* to fulfill the purpose of the Act to limit the number of overtime hours demanded by employers who were not—contemporaneously—bound to pay time and one-half for overtime.

F. The Aftermath.*

This action was tried in the District Court during the latter part of November, 1944 (R. 2). The decision was handed down on December 31, 1945 (R. 68).

The agreement having expired by its terms on April 20, 1945 (Ex. 1), negotiations were commenced looking forward to the execution of a new agreement. The new agreement, executed between the Realty Advisory Board on Labor Relations, Inc. and Local 32-B of the Building Service Employees International Union, was signed on December 4, 1945 and is known as the Frankenthaler Agreement.

The Frankenthaler Agreement, in many respects identical with the agreement with which we are here concerned, contains an important difference. By the terms of the Frankenthaler Agreement, all employees other than watchmen receive fixed minimum weekly wages for workweeks which are set at 40 hours. It is further provided that their hourly rates shall be computed by dividing their weekly wages by 40.

The Frankenthaler Agreement has not, however, completely discarded the device here considered. It continues the old plan with respect to the night watchmen. On the 11th day of December, 1946, two days after this Court had granted the writ of certiorari, the Realty Advisory Board on Labor Relations, Inc. issued a circular to its members advising them to defer any change in

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* In *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 533, Justice Brandeis stated: "Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the results of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgment, the court should acquire knowledge, and must, in my opinion, take judicial notice whenever required to perform the delicate judicial task here involved."

the payment practices affecting the night watchmen until after the final decision in this Court.

The Decision and Findings of the District Court.

The District Court found that the employment of the plaintiffs had been "at fixed weekly rates of compensation" (R. 57, Finding of Fact "15"). It found that the contract formula "did not correctly calculate or determine the true hourly rates of their employment" (id., Finding of Fact "17"). It found that the contract formula "was designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (id., Finding of Fact "18"). It found that the purpose of the formula "was to reduce the hourly rate sufficiently so the payment of time and a half for overtime would not bring the total weekly earnings substantially above the weekly rates set by the agreement" (id., Finding of Fact "19"). It found, finally, that the plaintiffs did not receive compensation for their overtime hours "at rates equal to at least 1½ times the regular hourly rates at which they were employed" (R. 56, Finding of Fact "13").

We must now consider a portion of the opinion of the District Court with respect to which certain statements in Petitioners' brief might otherwise convey a wrong impression. The opinion of the District Court contained the statement: "The fact that defendants here actually applied in all situations the hourly rates so derived does not validate such rates. The manner in which the hourly rate is determined and not the application of an hourly rate is the test" (R. 67).

This excerpt from the opinion of the District Court must be read in conjunction with the express finding that

the weekly payments did not conform to what they would have been if the formula had been "strictly followed" (R. 58, Finding of fact "20"). It must also be read in the light of its immediate context. Therein the District Court was simply disposing of the defendants' contention that the use of the formula quotient to make adjustments of the fixed weekly wages in the presence of absences, etc. must elevate the figure thus selected into the regular hourly rate of the employment. The rationale of the District Court's rejection of that argument had been stated just before the utterance referred to (R. 66-7). The Court stated that, once it had been found that the compensation had been fixed upon a weekly basis, "the determination of the regular rate became 'a matter of mathematical computation, the result of which is unaffected by any designation of a contrary regular rate in the wage contracts.' *Walling* v. *Hardwood Co.*, 325 U. S. 419, 425" (R. 66).

In other words, the District Court's statement that the formula quotients had been used was made *arguendo* and solely for the purpose of disposing of defendants' argument that such use could consecrate the formula quotient into the true regular hourly rate of the employment. The assumption having thus been made, defendants' argument was met by the statement, in substance, that, once the regular hourly rate of employment on a weekly wage basis had actually been determined, the mere fact that the employers used a different figure in making their adjustments of the weekly wage could not have the effect of elevating the figure so chosen into the regular hourly rate of the employment.

The Decision of the Circuit Court of Appeals.

The decision of affirmance of the Circuit Court of Appeals was unanimous and its opinion was *per curiam* (R. 81-4).

The nucleus of the opinion was as follows (R. 84):

> "It does negate the statutory purposes to base employment upon a regular unvarying weekly wage for a workweek in excess of the statutory minimum hours and then merely break that down into so-called regular and overtime hourly rates by means of a formula so the weekly wage actually definitely fixed is seemingly transferred into an hourly wage rate. That amounts but to an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek."

ARGUMENT.

I.

The employers of elevator operatives and general maintenance employees of buildings in the New York City area have long followed the practice of equating a fixed weekly wage with a fixed workweek. The lengths of those workweeks were always far in excess of 40 hours per week.

The 1942 judicial determinations that the Fair Labor Standards Act was applicable to this employment threatened these employers with a substantial rise in labor costs. For by the terms of that Act they were now obligated to pay for all working hours in excess of 40 in each week at the rate of 1½ times the regular hourly rates of employment.

In this situation the employers invented a scheme through which they hoped to be able to continue to hire their employees for workweeks substantially longer than the statutory maximum while avoiding the increased labor costs which the Act would require. The new invention consisted in continuing to employ the men upon the basis of a flat weekly wage for workweeks fixed at hours substantially in excess of the statutory maximum, but to include a formula through which the flat weekly wage would appear to have been derived as the end-result of the application of straight time and overtime rates to the separate categories of hours.

The flaw in the employers' plan rested in the circumstance that, while a flat weekly wage for an extra-statutory workweek can always, by arithmetical ingenuity, be expressed in such a form as to cause it to appear to have been a composite of earnings based upon different hourly rates, that is not the equivalent of a wage which had been so derived in fact. The true test is not how the weekly earnings can be expressed, but how, in fact, they had been determined. By that test, a weekly wage which truly represented the total of straight time and overtime compensation properly computed would be in compliance with the Act; whereas a weekly wage which was simply a flat payment for an extra-statutory workweek would be illegal.*

There is reason to believe that the employers them-

* The failure to understand this distinction has given rise to the "dilemma argument" of counsel for the *amicus curiae* (Brief, p. 19, first paragraph). Of course, the mere fact that an employee's compensation has been expressed as a weekly wage does not exclude the possibility of its having been the genuine aggregate of straight time and overtime compensation properly computed. A weekly wage which had actually been so derived would be in compliance with the Act. But the defect of the wages with which we are here concerned is that they had not been so derived, and that the formula through which such a derivation was attempted to be simulated was a hoax.

selves were keenly aware of this difference between appearance and reality. Great efforts were made to cause it to appear that the weekly compensation was not a flat wage for a fixed extra-statutory workweek, but that it actually represented the weekly earnings which had resulted from the application of straight time and overtime rates to the hours worked. These efforts at dissimulation may now briefly be reviewed.

As each employee received his weekly wage, he was directed to sign his name on a payroll record which was splashed with figures purporting to show how the weekly wage had been derived from regular time and overtime hourly rates. And, whenever the presence of excusable or inexcusable absences indicated that the fixed weekly wage should be adjusted, the adjustment was made upon the basis of the hourly rate fabricated by the formula rather than at the rate which would have resulted from dividing the fixed weekly wage by the number of hours worked. It was thus hoped that the improper calculation of the regular hourly rate of the employment in one or more instances might sanction the use of the same improper method when it became necessary to ascertain whether the employee had received proper overtime compensation.

But the mask was threadbare. The weekly payroll records upon which so much reliance was placed were themselves the most unerring indications of what had been done. And the amounts of the alleged "hourly rates" which the formula precipitated negatived the possibility that anyone, save only the payroll clerks, could ever have known what they were. Finally, in the circumstance that the employers themselves recognized that the formula quotients could not yield overtime compensation for the hours which exceeded 46 (unless multiplied by 1¾), we have the clearest indication of the employers' own construction of the point at which overtime compen-

sation began—that is, with the hours above 46 instead of with the hours above 40.

All in all, there was not a single contract provision, payroll entry, calculation or payment which does not point to the fact that the compensation was simply a fixed weekly wage for an extra-statutory workweek, and that the formula and its derivative quotient was simply a subterfuge. The skin may have been the skin of an hourly rate, but the voice was the voice of a fixed weekly wage.

Petitioners claim that the method of payment used was the only one which was practicable. This argument is associated with a reference to the thousands of employees involved, stated in such a manner as to imply that there were as many different wage levels as there were employees.

In the first place, an examination of the contract reveals that, however large the total number of affected employees, there were only 12 different wage categories (Ex. 1, p. 25). Accordingly, it would have been as easy to express each one of these wage levels in terms of hourly rate as of weekly wage.

The learned counsel for the *amicus curiae* suggest that some of the employees other than those here involved had previously been classified in terms of differing weekly wage levels, and that it would have been impracticable to reclassify them in terms of their appropriate hourly rates (Brief for Midtown Realty Owners' Association, Inc., *Amicus Curiae*, pp. 16-17, footnote).

It will be necessary to examine some preliminary matters in order to ascertain the true dimensions of the situations referred to. Thus, it will be noted that not one of the employees here suing as plaintiff came within any of these allegedly exceptional categories. Moreover, the con-

tract itself in no instance purported to state the compensation payable to any employee affected by a special wage "differential" (Ex. 1, p. 25).

The only conceivable application of counsels' argument would be to the employers' treatment of certain of their employees other than those here plaintiff. So limited, the argument would be that the prior statuses of such employees, as not falling within any of the payment categories of the main body of the employees, rendered it more significant to state their compensation in the form of a weekly wage, which was in accord with their previous manner of payment, than with an hourly rate which would have been a departure therefrom.

Once the limited distribution of the employees falling within these special categories be recognized, the inadequacy of counsels' argument is apparent. A contract which did not purport to state the compensation payable to any such employees and payroll records which were not concerned with any such employees both showed that the compensation of all the employees had been fixed in terms of weekly wages. So that, even if these employees of special status had really required compensation in the form of weekly wages rather than hourly rates, it would be unreasonable to seek explanation of the uniform treatment of the many in the special requirements of the few.

Beyond everything else, however, it is difficult to understand why even the employees who were on differential weekly rates could not with equal convenience have been placed on differential hourly rates. Counsels' constant coupling of the weekly wage basis with such phrases as "less abnormal" and "less unwieldy" contains a glibness which a close examination of the facts will dissolve. It was not hourly rates as such which would have been unintelligible, but those misshapen formula quotients which the employers' camouflage necessitated. Relieved of the

necessity of the mathematical masquerade, it would have been very easy for the employers to have placed their employees upon stated hourly rates and then simultaneously have informed any of those who were interested as to the amounts of their derivative (in that event, truly derivative) weekly wages. For the distinctive aspect in the picture presented by all these employees was that they were on workweeks of constant length. Thus, there was no principle of income stabilization which could have served to render the weekly wage preferable to the hourly rate basis. Compensation calculated upon the basis of hourly rates would, the workweeks being constant, have yielded constant weekly wages, too.

A final word may be said upon this whole argument of impracticability. Its bad faith is attested alike by the ease with which the employees could have been placed upon hourly rates as against the extremely complicated character of the payroll masquerade, by the ease with which they might alternatively have been placed upon 40 hour workweeks in the manner actually done under the Frankenthaler Agreement and, finally, by the contemporaneous evidences of the real purpose of the entire arrangement: to standardize a 46 hour workweek at a flat weekly wage through a device which would offset the full overtime costs which would otherwise ensue (Ex. 4, p. 70). In the face of this clear expression of the true purpose of the arrangement, the present attempt to find sanction upon the basis of practicability has all the defect of a posthumous rationalization.

The decision of the Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, is distinguishable.

In the *Belo* case, the wage bargain had been made in terms of stated hourly rates. Thereafter the men received guaranteed weekly wages which were practically

always higher than the total of their straight time and overtime compensation as measured by the stated hourly rates. The Court found that the purpose of the guarantee was to insure a stable weekly income for men whose workweeks were so irregular that they would otherwise have been denied the benefit of a constant wage.

In this case, it cannot possibly be claimed that the parties had ever dealt with one another upon the basis of stated hourly rates. Nor can it be claimed that the employees themselves received any benefit from the payment of compensation in the form of a fixed wage for an extra-statutory workweek. For it is uncontradicted that, their workweeks having always been constant, their weekly earnings would have been regular however they had been determined. Far from seeking any object from which these employees could have benefitted, the sole purpose of the instant arrangement was to standardize an extra-statutory workweek through a formula "designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way" (Ex. 4, p. 70).

The Belo umbrella does not extend to such an arrangement.

The doctrine of the Courts below is implicit in the decisions of this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, and *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37.

The identical plan has been rejected by the Circuit Court of Appeals for the Third Circuit. *Watkins* v. *Hudson Coal Co.*, 151 Fed. (2nd) 311, 316, cert. den. 66 S. Ct. 522. Learned counsel for the *amicus curiae*, in purporting to list the authorities relied on by the Administrator in his brief in *Walling* v. *Halliburton Oil Well Cementing Co.*, No. 74, this Term, failed to include that case

(Brief, p. 21, footnote). The formula involved in that case was identical with the one in the case at bar.

In *Walling* v. *Helmerich & Payne, Inc.*, 138 Fed. (2nd) 705, the Circuit Court of Appeals for the Tenth Circuit also held that this formula violated the Act. The "X-plan" there considered was identical with the formula in this case. Stated in terms of the workweeks of these plaintiffs, $40X + 6\left\{\frac{3X}{2}\right\}$ equals the weekly wage. Upon reduction, this equation becomes $49X$ equals the weekly wage, or the very formula with which we are here concerned.

We know of no decision to the contrary in any Circuit. Each of the decisions referred to in the briefs submitted on behalf of the Petitioners and of the *amicus curiae* is distinguishable. The common distinguishing characteristic arises from the differentiation which must be made between compensation derived from a stated hourly rate and a fixed weekly wage expressed in such a manner as to simulate an hourly rate derivation.

II.

It will be noted that the plaintiffs' right to recover under the Act for the period between April 20 and September 5, 1942 (the retroactive period) rests upon a different footing and is independent of the entire foregoing discussion. For, even assuming that defendants' entire device had been proper, it would still have been ineffective to release them from obligations which had already accrued. *O'Neil* v. *Brooklyn Savings Bank*, 324 U. S. 697.

The attempt to apply the formula *nunc pro tunc* brings its true function into clear relief. It is simply a mystic incantation, fashioned for the sole purpose of removing

any weekly wage contract whatsoever beyond the power and sphere of activity of the Fair Labor Standards Act.

III.

Public policy.

The endorsement of this arrangement would have one certain consequence. The hour ceiling under the Act would be gone. A fixed wage for a workweek far exceeding the statutory maximum and accompanied by a formula which need be no more than a pretense would become standard equipment for all contracts of employment.

The purpose of Congress to load overtime costs to the end of standardizing a 40 hour workweek would succumb before the bait of the weekly wage viewed as a whole. With the reduction of the overtime loading to a mere bookkeeping device, the workweeks of the future would be standardized at levels which cannot now be foreseen, except that they would be unaffected by the policy of the Act.

IV.

CONCLUSION.

The judgment of the Court below should be affirmed.

Respectfully submitted,

WILBUR DUBERSTEIN,
FREDERICK E. WEINBERG,
Counsel for Respondents.

Dated, January 31, 1947.

APPENDIX.

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., Secs. 201 *et seq.*) are as follows:

> "Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——
>
> (3) For a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

The Act contains another provision which emphasizes the purpose of Congress to standardize workweeks not exceeding 40 hours. Therein the Act provides that, while certain collective bargaining agreements may be exempt from the provisions of the Act, it shall be a condition of that exemption that the weekly average of the total hours of employment shall not exceed 40 hours. In other words, the exemption of a collective bargaining agreement is conditioned upon the observance of the requirement that the average workweek does not exceed 40 hours.

The section referred to is included under Section 7 and is as follows:

> "(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed——

(1) In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks."